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No. 84-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALPHA PORTLAND INDUSTRIES, INC., etc., et al
Petitioners,

vs.

ROBERT ANDERSON, JR., et al,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. In ERISA actions for repudiation of vested insurance benefits under ERISA benefits plan, are retirees bound to exhaust using a grievance and arbitration procedure contained in a separate collective bargaining agreement and specifically limited by employer and union to use and invocation solely by employees?

2. Pursuant to ERISA disclosure requirements, 29 U.S.C. §1022, are ERISA plan and ERISA plan sponsor bound by review procedures and statements made by them in Congressionally-mandated summary plan description?

3. Are retirees who are wrongfully denied ERISA plan benefits, improperly deprived of their right to full and fair review by a fiduciary mandated by ERISA Section 503, 29 U.S.C. §1133, by the district court's dismissal for retirees' failure to arbitrate under employer-union agreement when (a) grievance procedure always limited use and invocation of such procedures solely by statutory employees, (b) retirees' former recognized collective bargaining representative (local union) had long been dissolved, (c) after plan repudiation by petitioners, employer put national union under duress to enter into what petitioners call a forfeiture-of-vested-retirement-benefits agreement, and (c) national union had never agreed to arbitrate for retirees and refused to arbitrate for retirees, putting them "on their own"?

4. Do Steelworker arbitration trilogy presumptions attach to dispute over petitioners' repudiation of vested insurance benefits given to retirees for life under terms of ERISA benefits plan unilaterally created by employer and at times, from time to time thereafter, subjected to collective bargaining by local union recognized by employer to be representative only for NLRA Section 9 employees and not bargaining spokesman for retirees?

5. Where contractual arbitration procedure in local union collective bargaining agreement permits arbitration only as to such matters and using such procedures as local union and employer shall agree upon, and retirees' former collective bargaining representative (local union) had been dissolved with earlier plant closing, and no procedures exist for selection of arbitrator, may employer and plan use the defense of failure of contract arbitration exhaustion to oppose retirees' action for repudiation of vested insurance benefits provided in separate ERISA benefits plan?

6. Is arbitration of plan and plan sponsor's repudiation of benefit obligations to retirees, prohibited as a matter of law?

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vs.

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On Petition for a Writ of Certiorari to the
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RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Petitioners Alpha Portland Industries, Inc. ("Alpha") and its Plan which Alpha administers, have asked this Court to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered en banc January 16, 1985, and reported at 752 F.2d 1293. The Court of Appeals reversed the district court's dismissal and denied of both reconsideration and stay.[1] Because the decision of the appeals court is correct and raises no questions warranting review by this Court, respondents, all retirees of Alpha, respectfully urge this Court to deny the pending petition.

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[1] The Petition for Certiorari should be dismissed for failure of petitioners to include all decisions below. Petitioners included only one of the district court decisions from which appeal was taken to the court of appeals.

(cont. on next page)

STATEMENT OF THE CASE

Petitioners' "statement of the case" is inaccurate and at odds with the facts recited by the United States Court of Appeals for the Eighth Circuit.[2] Petitioners' statement also omits many pertinent facts. Therefore respondents deem it necessary to provide a separte statement of the case, as follows:

This action was instituted as a class action by respondents who are aged persons who have from time to time retired from their employment with petitioner Alpha, some retiring as far back as early 1960's. Upon retirement each received a pension and reassurance they and their spouses would continue to receive life and health insurance coverage for life as promised in the benefits plan Alpha unilaterally created in 1946 and improved from time to time as to employees who later retire. Effective

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Respondents (as dismissed plaintiffs in the district court) filed their notice of appeal appealing from not merely the order issued by the district court on November 12, 1982, which petitioners include in their appendix, but also from the further district court order and decision of March 4, 1983 denying stay, new trial or further consideration. A copy of that notice of appeal is in the appendix, page A-1.

The concluding remarks in the district court decision petitioners exclude, reveals an inhospitability by the district judge to ERISA beneficiaries and to ERISA purposes, and a deliberate record bias by the district court for petitioners. The district court even denounced respondents' bringing the recent Eighth Circuit decision in *Robbins v. Prosser Moving & Storage Co.*, 700 F.2d 443 (1983), affirmed sub nom *Schneider Moving & Storage Co. v. Robbins*, 80 L.Ed.2d 366 (1984), to his attention, conduct this Court allows as a matter of course. Supreme Court Rule 22.6. The United States Court of Appeals for the Eighth Circuit en banc, found that the district court prejudged the underlying merits issues for petitioners. 752 F.2d 1293, 1294 n.1.

[2] The United States Court of Appeals en banc was particularly critical of petitioners' statement repeated several times in its current petition that "certain collective bargaining agreements are the source of [respondents'] claims for a right to receive life insurance and medical benefits for the rest of their lives." See 752 F.2d at 1296 n.3. The source of respondents' claims is an ERISA benefits plan.

May 1, 1982 petitioners repudiated the lifetime insurance obligation provided by the benefits plan for all retirees at all presently operating and closed plants, affecting over 450 retirees and their dependents at nine former plants. The named repondents are all retirees from Alpha's now closed St. Louis plant.

Respondents sought remedies for petitioners' repudication of respondents' vested retirement life and health insurance benefits under the benefits plan. Contrary to petitioners' attribution of the collective bargaining agreement as the source of benefits, the Eighth Circuit en banc noted the source of respondents' claims for the continuation of vested insurance benefits was the separate ERISA benefits plan, 752 F.2d at 1296 n.3, which plan had been unilaterally created by Alpha and was always administered solely by Alpha and its agents (Equitable).

Plan origination did not result from collective bargaining. For many years the collective bargaining agreement made no reference whatsoever to the benefits plan, and at most times thereafter the reference was at best one in passing; that is, at times the collective bargaining agreement explicitly required plan improvement for active employees (and *future* retirees) only, and at times the local agreement was silent on the obligation of the employer for plan continuation. The plan and retiree benefits always continued. During the course of collective bargaining, even before this Court's decision in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), but using the very same rationale, Alpha rejected local union efforts to bargain for increased benefits for persons who had already retired.

Several respondents had retired before the separate plan instrument was revised to include any language as to how benefits disputes might be resolved. 752 F.2d at 1294 n.1. The plan document never contained any internal grievance procedure. The plan document last existing refers to possible use of the

grievance procedure "in the Basic Agreement," but the Basic Agreement negotiated as a result of coordinated bargaining between a number of unions and Alpha, contained no grievance or arbitration procedures. The last extant collective bargaining agreement at the time of plant closing with resdpondents' local union, called a "Local Agreement" (and *not* "Basic Agreement"), limited its grievance procedure solely to use by employees. The grievance and arbitration procedure in the Local Agreement had never been used to arbitrate disputes involving retiree benefits under the plan.

Many respondents retired long before Alpha closed its St. Louis plant in December 1981, and all had retired by plant closing. When Alpha closed its St. Louis plant respondents' prior collective bargaining representative, a local union, was dissolved. The local union did not exist when petitioners later repudiated their plan obligations to retirees.

The Local Agreement provided that arbitration on any "employee" grievance may occur only if the local union and Alpha can at the time "mutually agree" on how the arbitrator is then to be selected, what will be the subjects for arbitration and only if they can also then agree on arbitration procedures. It was understood the union could strike if no agreement could be reached. Petitioners represented to the district court that there was an understood arbitration machinery dispensing with concern about any need for agreement, but on appeal petitioners acknowledged that such was not true. Petitioners suggested on appeal if the collective bargaining parties (Alpha and union) could not agree on the arbitrator's selection and what subjects they would agree to arbitrate or what procedures they were to agree upon, the same district judge who had already prejudged the matter, could select the arbitrator and impose his views on what a reasonable arbitration agreement would be.

When ERISA was enacted Alpha distributed a summary plan description to respondents pursuant to 29 U.S.C. §1022. The booklet confirmed that the retirees' insurance benefits con-

tinued "for life" and advised further that if there was any difference with respect to benefit matters, beneficiaries could use either the grievance procedure *or* use a separate procedure of direct appeal consistent with the procedures set out in ERISA Section 503, 29 U.S.C. §1133.

When petitioners announced their repudiation of respondents' vested benefits, since respondents' local union was then dissolved respondents asked the national union what could be done. They were told that the national union did not propose to help them, sympathetic as it was, that it did not represent retirees, that it never represented retirees in arbitration before and did not propose to do so then, and that the respondents where thus "on their own."

Unbeknownst to respondents, at that time Alpha made the subject of benefits for past retirees a mandatory subject of bargaining with the national union and two other (remaining) locals at Alpha's two Eastern plants then being sold. Alpha put those unions and what few remaining members they had at two Eastern plants, under tremendous offensive duress to force the national union and its remaining active employees still in Alpha's employ at Alpha's two last plants located elsewhere, to agree to "exclude" the vested life and health insurance benefits guaranteed under the benefits plan to those who had retired. Alpha further insisted before signing that agreement, that only those then-active employees at the two plants vote for the "exclusion," which vote took place without notification to respondents and other eligible retirees, leading to majority vote for "exclusion" and union concession to Alpha's "exclusion" agreement.

Within days of the union's "exclusion" concession then unknown to the retirees, respondents asked petitioners to pursue the review procedures set out in ERISA, 29 U.S.C. §1133, and as allowed to them in the summary plan description, which review procedures call for a full, fair review by a fiduciary using

fiduciary standards. Alpha did not then propose arbitration in response, but simply delayed response using the ninety days allowed by the Secretary's regulations promulgated under Section 503, to prepare for litigation. When Alpha did not announce any decision, upon expiration of the ninetieth day respondents commenced suit. They claimed rights separately under both the ERISA benefits plan and consistent with this Court's decision in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, supra, 404 U.S. at 181 n.20, under the collective bargaining agreement, alleging however primary jurisdiction based on ERISA, 29 U.S.C. §1132.

During proceedings in the district court, petitioners advised that if the union were to arbitrate and win in an arbitration for the retirees, petitioners intended to hold the national union responsible in damages for petitioners failure to achieve the "benefits" from the "exclusion" agreement they had forced on the national union and its two remaining locals. Petitioners also told the district court they would judicially attack any adverse arbitration decision that attempted to go beyond the terms of the collective bargaining agreement, to prevent the arbitrator from considering petitioners' obligations under the terms of the separate ERISA group benefits plan or the meaning and applicability of the summary plan description expressly confirming to retirees that the plan language meant the retirees' insurance and health benefits were "for life."

By two decisions, only one of which petitioners include in their appendix, the district court found all respondents, no matter when retired, were subject to the most recent Basic and Local collective bargaining agreements which, without hearing, it found to be the source of any and all retiree rights. The district court demanded that Alpha be fully trusted and that respondents find a way to arbitrate through an unwilling national union who was never their collective bargaining representative and who executed the "exclusion" agreement. The district court held that the suit should be dismissed. The se-

cond district court opinion also found the lawsuit and respondents' arguments opposing arbitration and seeking 503 review procedures, frivolous. The district court threatened respondents with sanctions for suggesting arbitration in the least bit inappropriate. It denied a request for stay. The district judge even told respondents in that second decision that they should suffer and deserved to suffer for questioning the appropriateness of arbitration; he refused to even rule on respondents' request for preliminary relief.

On appeal taken by respondents, a panel of the Eighth Circuit reversed in January, 1984, 727 F.2d 177, finding arbitration inappropriate. Even the dissent would have reversed the denial of a stay and remanded for different reasons. The dissent, which was also the sole dissent en banc, would not so certainly trust Alpha and recognized problems were realistically present by reason of the respondents' local union's dissolution and the arbitration clause's requirement of mutual agreement on arbitrator selection and arbitration subjects and procedures each time a grievance arose. The dissent would allow the district judge to use his "discretion" to meet those problems.

Because the panel majority on appeal heavily relied upon the Eighth Circuit's decision en banc in *Robbins v. Prosser Moving & Storage Co.*, supra, which had then been accepted for review by this Court sub nom *Schneider Moving & Storage Co. v. Robbins*, 80 L.Ed.2d 366 (1984), at petitioners' request the appeals court granted rehearing en banc expressly to reconsider respondents' appeal after the decision of this Court in *Schneider*, supra. At the oral argument before this Court in *Schneider* both Mr. Yates as counsel for petitioner Schneider Moving & Storage Co. and Mr. Luplow as counsel for the respondent trustees, advised that clearly if this were a case involving the beneficiaries themselves, such as retirees, there would be no question but that such retired beneficiaries would not be subject to Schneider's arbitration defense. Mr. Yates attempted to suggest, however, that the trustees were not in as

protected a position as would be such persons as retirees seeking benefits. He insisted the trustee rely on the union. Mr. Luplow suggested, however, that the trustees should stand alike with such classes as retirees whose rights and interests the trustees sought to protect.

Following this Court's decision in *Schneider,* supra, the Eighth Circuit en banc reconsidered the panel decision, and by a vote of seven to one agreed with the prior panel majority. The court of appeals en banc held for any number of reasons that Alpha's arbitration defense was always improper. Among the reasons was that respondents sued under the terms of the plan for plan violation; that the plan internatlly contained no arbitration procedure; that the district court could not reject and erred to refuse to consider Congressional requirements for the full and fair review by a fiduciary, 29 U.S.C. §1133; that the summary plan description expressly confirmed an alternative review other than through representation by the union or use of the grievance procedure; that no union constituted any retirees' exclusive collective bargaining representative under fact or law; that the potentiality of conflict between the union and retirees was far too great to permit exclusive representation by the union; that the grievance procedure in the collective bargaining agreement was limited to use solely by Section 9 (29 U.S.C. §159) employees; and that the district court erred in making several prejudgments with respect to the merits of the litigation without allowing respondents to be heard. The court of appeals en banc also held that because of this Court's decision in *Allied Chemical Workers,* supra, and its recognition therein of the potentiality for conflict, it need not consider the meaning of the national union's conduct in rejecting the retirees' pleas for help and putting them "on their own" or the unions' entry into the "exclusion" agreement Alpha contended thereafter forfeited respondents' vested life insurance and health benefits guaranteed by the plan.

The Eighth Circuit also found that retirees' interests as plan beneficiaries are more aligned with those of the trustees than with those of active workers, and that like the trustees, retirees do not have the same economic resources or ability to disrupt industrial peace as to do active workers, and that the purposes behind the Steelworkers' arbitration trilogy, particularly the quid pro quo of arbitration in exchange for industrial strife, does not lend itself to claims of retirees who have no ability to strike or take other economic actions guaranteed by Congress to active employees by Section 7 of NLRA, 29 U.S.C. §157.

Although petitioners now state that the district court and the appeals court addressed the obligation of active employees to use the grievance procedure for their plan disputes, no court addressed this as an issue in the case. In fact the Eighth Circuit en banc left the question open. 752 F.2d at 1299-1300.

REASONS FOR DENYING THE WRIT

Summary of Argument

The facts and events are too complex to develop guidelines for any other case. A decision by this Court would have meaning only for the parties hereto.

If review were granted, petitioners would have this Court reverse and change the meaning of a number of cases previously decided by this Court. It would also require this Court to reject ERISA Sections 2(b) and 502, and to set aside Congressional demands for a review procedure mandated in ERISA Section 503.

The Eighth Circuit's decision fully and fairly comports with this Court's rationale in prior cases including *Schneider,* supra, and *Allied Chemical Workers,* supra.

I. Review Should Not Be Granted For The Facts Do Not Lend Themselves To The Establishment Of Any Meaningful Guidelines For Other Cases

Because of the complexity of the facts in this case, this is not a good case to provide guidelines for other cases to come. For example, the respondents' collective bargaining representative dissolved with plant closing. Respondents have no collective bargaining representative. Had the Court wanted to consider the collective bargaining representative's role vis-a-vis its own retirees, where the representative remained intact, *International Union, UAW v. Yard-Man, Inc.,* 716 F.2d 1476, 1485 (6th Cir. 1983), presented a better case, for the union there was not dissolved and it made every attempt to protect retiree rights rather than "exclude" them. Most unions would not do what Alpha said the national union and remaining active employees did here—"sell out" retirees' vested benefits to secure their own interests. This Court denied certiorari in *Yard-Man,* 79 L.Ed.2d 234 (1984).

In this case the benefit plan was unilaterally created by Alpha, not as the result of collective bargaining. Later collective bargaining agreements at times covered benefits for active employees and at times the agreement terms were silent, while the plan and plan obligations always continued and retirees always received their group insurance benefits whether there was any bargaining commitment or not. Since respondents' action was brought essentially for plan violation under ERISA, petitioners' search for guidelines on 301 breach-of-collective-bargaining-suits will be of little help.

Alpha's own summary plan description recognizes that the grievance-arbitration machinery is not mandatory, and provides an alternative method consistent with ERISA Section 503 guidelines, 29 U.S.C. §1133. A far better case for this Court to review the question whether a union or employer can restrict retirees to use of collective bargaining grievance machinery, should be presented by a case where there is no alternative procedure provided. Again *Yard-Man,* supra, would have allowed this issue to have been presented "clear" of alternatives. The alternative procedure in the instant case is clearly akin to the trust agreement's provision in *Schneider* that allowed the trustees to use methods of collection other than arbitration.

Another more compelling reason for this case not serving as a vehicle for guidelines, is the presence not merely of *Allied Chemical Workers'* "potential for conflict," but in fact actual conflict, the union putting retirees "on their own" when they asked for help and excluding retirees from notice or vote before entering into the "exclusion" agreement solely to protect active workers and to continue dues check-off. Petitioners exacerbated the conflict in this instance by warning the national union that a damage action is in the offing for Alpha's loss of "benefit" from the "exclusion" agreement should the national union agree to arbitrate, try and win the arbitration. Again, a case such as *Yard-Man,* supra, would have presented a far better factual instance, for there the union would not attempt to

sell out the interests of retirees; in fact the UAW wanted to protect its retirees and complained Yard-Man took advantage of them by not dealing with the union on benefits termination for retirees, a complaint that is justified if respondents were statutory employees that petitioners assert they are. *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 683-84 (1944).

The dissolved status of the local union presents yet other difficult problems, discussed in part II below.

It would also be far better to save review for a case where the arbitration language was clear and mandatory. The grievance machinery here is limited solely to intiation by employee complaints rather than the usual language allowing any party or person to take up all disputes or differences. In this instance there are still further problems, as Judge Bright in his panel dissent noted, for even if a national union would be allowed to and were to agree to arbitrate for respondents as if they were employees, there is still no assurance the national union could reach agreement with Alpha on selection of the arbitrator or that the parties could agree on what subjects would be submitted to the arbitrator or what arbitration procedures they would use, all as the arbitration clause requires as precondition. Instead of having assurance that there would be arbitration, as in *Boy's Market v. Retail Clerks,* 398 U.S. 235 (1970), at best the Court would only be able to do what it said it did not want to do in *Clayton v. International Union, UAW,* 451 U.S. 679, 693 (1981), that is, subject the complainants to energy and resource-wasting procedures without assurance of an efficacious result. With a poor, aged and ill population, that drain is much more meaningful.

With the facts so complex, it is submitted that this case does not present the type of case that allows clear and concise guidelines on any of the issues that petitioners seek to raise. Respondents have posed alternative questions should this Court consider review appropriate.

II. To Grant Review Would Require This Court To Change The Effect Of Many Of Its Prior Decisions As Well As Congressional Declaration

This Court in *Lewis v. Benedict Coal Co.*, 361 U.S. 459 (1960), would not allow plan beneficiaries to stand in the same shoes and be subject to the same defenses as the collective bargaining representative. In fact, this Court in *Schneider,* supra, cited *Benedict Coal* as reason to protect the trustees, for the trustees were representing the beneficiaries. Petitioners would now suggest this Court reverse the importance of whom is to be protected as between beneficiary and trustee, in effect now having the "tail (trustee) wag the dog (beneficiary)." That would be inconsistent with this Court's pronouncement in such cases as *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), wherein this Court emphasized that the trustees' whole, sole and exclusive duty is to protect the interests of plan beneficiaries. *Id* at 331, 333-34.

To the extent that this Court held in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, supra, that retirees are not statutory employees subject to exclusive representation, and that potential conflict exists as a matter of law as between retirees and the collective bargaining representative whose duties are to protect the interests of active statutory employees, petitioners also seek total reversal. Petitioners seek to assure exclusive representation and to ignore the conflict, both potential and real. Similarly petitioners would have this Court reverse its own recognition in any number of cases including *Humphrey v. Moore,* 375 U.S. 335 (1964), *Bowen v. U.S. Postal Service,* 459 U.S. 212 (1983), and *Vaca v. Sipes,* 386 U.S. 171 (1967), that the

union's duty of fair representation rises solely out of the union's then obligations under Section 9 of the NLRA, 29 U.S.C. §159.[3] In effect petitioners ask this Court to either reject Section 9 as the basis for fair representation duties, or now find contrary to *Allied Chemical Workers,* supra, that retirees are still Section 9 employees so that the union's duty of fair representation continues and the grievance procedure limited to "employees" includes retirees.

Petitioners would also have this Court revise its decision in *Vaca v. Sipes,* supra, in a most peculiar way, by finding that while unfair representation may be an exception for grievance exhaustion as to statutory employees, such exception would not exist for non-Section 9 retirees. Whereas "potential conflict" was sufficient in *Allied Chemical Workers* to bar union representation, now petitioners urge even real conflict is insufficient for respondents to raise the *Vaca* exception for retirees.

In *South Prairie Construct Co. v. Local 627 Operating Engineers,* 425 U.S. 800 (1976), this Court said that it was the function of the NLRB and not the judiciary to determine the appropriate collective bargaining representative. The decision is most applicable here because not even petitioners dispute that plaintiffs' recognized collective bargaining representative, their local union, had been dissolved. Before the appeals court petitioners sought to avoid the processes of the NLRB, including the underlying principles of majority designation by secret

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[3] The Eighth Circuit was highly critical of petitioners' bootstrapping argument renewed on page 7 of their petition that "the union"—whatever and whoever that is—"owed a statutory duty [of representation] to retirees." That's exactly what the NLRB argued in *Allied Chemical Workers,* supra, assuring this Court that unions would never agree to let retirees' interests take second place to the union's own institutional interest or those of its active voting membership. This Court did not then agree. The duty of fair representation arises solely out of Section 9 representation. This Court said in *Allied Chemical Workers* that such representation does not exist for retirees. Retirees are not employees.

ballot election, by having the district court substitute another labor organization to represent the retirees, in this case the national union or one of the two remaining Eastern locals, neither of which were the respondents' recognized or certified collective bargaining representative at such times as respondents were statutory employees. This Court's decision in *South Prairie* is one reason that makes the dissent's proposal that the district court select another organization to represent respondents in arbitration, erroneous. District court selection also flies in the face of the NLRA's demand for majority designation.

Petitioners clearly recognize that there was no NLRB certification nor recognition of any other union as respondents' collective bargaining representative, for on page 7 petitioners advise that the only rationale for their suggestion to make this change of bargaining representative, is by this Court adopting a "long-standing relationship" standard, looking to the relationship between the local union and the national union and other locals. However, to make that "jump" this Court would have to ignore another line of its own decisions finding separate identities between the local and its parent. E.g., *Carbon Fuel Co. v. Mine Workers,* 444 U.S. 212 (1979). Moreover, can this Court imagine the uproar from employers and commentators if this Court had the NLRB relax the standard stated in such cases as *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), and its progeny, into one of some vague "longstanding relationship."

In *McDonald v. City of West Branch,* ____ U.S. ____, 80 L.Ed.2d 302 (1984), this Court held that arbitration is not necessarily appropriate for actions brought under federal statutes. See also, *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974); *Barrantine v. Arkansas-Best Freight Systems,* 450 U.S. 728 (1981). Cf. *Kremer v. Chemical Construction Co.,* 456 U.S. 461, 478 (1982). The Eighth Circuit views the wrongful termination of plan obligations as a violation of ERISA Section

404, 29 U.S.C. §1104.[4] Petitioners would have this Court depart from its view for one statute: ERISA. The courts of appeal do not agree with petitioners. E.g., *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) (arbitration not appropriate for retirement benefits; labor arbitrator without expertise on non-law-of-shop issues).

In the district court petitioners cited *Communications Workers v. Mountain States Telephone and Telegraph Co.*, ____ F.2d ____, 27 FEP Cases 1486 (10th Cir. 1978), to advise that they would not view the arbitrator's decision final and binding if he went outside the collective bargaining agreement and considered any other document (such as the plan or the summary plan description) or even ERISA's statutory requirements. Should the arbitrator be able to or agree to rule on plan obligations, the meaning of the plan as affected by the summary plan description, the meaning of ERISA Section 404, petitioners thus mean to attack in court if he finds in favor of respondents and the class. Under the circumstances, arbitration will not result in any efficacious decision, but simply require a poor, aged and ill population to waste their energy and resources. If petitioners are sustained, this Court would be required to change its own aversion to such waste announced in *Clayton v. International Union, UAW*, supra, 451 U.S. at 693. In this instance petitioners assure us that exhaustion would *not* lead to significant savings in judicial resources or speedy resolution,[5] the ultimate aim of this Court in *Republic Steel Corp. v. Maddox*, 379 U.S.

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[4] *Calhoun v. Falstaff Brewing Corp.*, 478 F.Supp. 357, 361 (DC Mo. 1979), opinion after trial sub nom *Dependahl v. Falstaff Brewing Co.*, 491 F.Supp. 1188 (DC Mo. 1980), modified on other grounds, 653 F.2d 1208 (8th Cir. 1981), cert den'd 454 U.S. 968 (1981).

[5] In light of petitioners' assurance to the district court it would judicially challenge any adverse arbitration determination based on plan terms, summary plan description or federal statute, petitioners' alleged concern of clogging the court dockets, made in the concluding page of their petition, rings hollow and insincere.

650, 658 (1965),[6] and *Boy's Market v. Retail Clerks,* supra, 398 U.S. at 249.

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[6] This Court did not hold in *Republic Steel,* supra, that exhaustion applies to non-statutory employees. This Court said "at all times material to [Maddox'] claim . . . Republic's industrial relations with Maddox . . . were subject to the provision of the [National Labor Relations] Act." Subsequently in *Allied Chemical Workers,* supra, this Court said retirees are not covered by that Act; they are not statutory employees. In *Republic Steel* this Court repeatedly called Maddox "an employee."

In *Republic Steel* this Court held that "severance claims are not critically unlike other types of grievances." But here benefits claims (and fiduciary breach claims, text to note 4 supra), like the trustee collection claims in *Schneider,* present "trust" claims. Even in *Republic Steel,* supra, this Court recognized it would look to see if the claim was "different in kind" from ordinary contract grievances and decided against Maddox because "his suit in the present case is simply on the contract." Respondents' suit is founded primarily on an ERISA benefits plan.

Finally this Court concluded in *Republic Steel* with the statement:

> "in neither the facts nor the pleadings is there any suggestion that Maddox could not have availed himself of the grievance procedure instead of waiting three years and bring a court suit."

In this case plant closing had occurred many months before benefit cessation and plan repudiation, and many retirees had retired even long before then. After plant closing the local union had dissolved and later the national union told respondents that it would not proceed under the grievance procedure for them, that retirees were "on their own." Petitioners cannot present the instant case for which they seek review as a *Republic Steel* case even if this Court had never decided *Allied Chemical Workers,* supra.

Even if *Republic Steel* were relevant, this Court recognized that there may be some types of specific grievances that were "so different in kind as to justify exception." Hence, even if respondents here could be called "employees" as petitioners ask this Court to do, we submit this Court's later decision in *Allied Chemical Workers,* allows a retiree claim for vested life and health insurance benefits to be classified as "so different in kind." However, respondents submit this is not the appropriate case to review that question in light of the other facts to which this Court addressed itself in its concluding remarks in *Republic Steel,* supra. The Eighth Circuit was correct in its analysis to give this Court's more recent decision in *Allied Chemical Workers* a stronger voice in its decision than the earlier decision in *Republic Steel.*

Although the court of appeals en banc in the instant case for which petitioners seek review, clearly explained a difference between the decisions of lower courts petitioners now cite and the case here, recognizing that a collective bargaining agent "if it chooses," may seek to assert retiree rights to protect the interests of statutory employees under a collective bargaining agreement,[7] the instant case is one primarily over petitioners' repudiation of plan rights of non-statutory employees brought under ERISA Section 502, 29 U.S.C. §1132. That section makes no provision for nor gives a union a role as a party plaintiff in an ERISA action for plan violation. The effect of the present petition for review is to suggest that notwithstanding Congressional allowance ERISA beneficiaries may sue, a union and employer may control and interfere with rights and remedies Congress expressly granted to plan participants and beneficiaries who aren't even statutory employees or in the bargaining unit. Until the enactment of ERISA, retirees' only way to achieve federal review had been to rely upon their collective bargaining agreement. *Allied Chemical Workers,* supra, 404 U.S. at 181 n.20. Notwithstanding the enactment of ERISA since that decision, petitioners would have this Court return to the collective bargaining agreement as the sole source of retirees' rights in federal actions.

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[7] The question presented in those cases and here is not focused on whether the employer is contractually committed to arbitrate under an arbitration clause that allows no arbitration to proceed until after the parties further agree on selection of the arbitrator, arbitration procedures and issues. Respondents do not seek to force Alpha to arbitrate. Nor is the question presented here in terms of Alpha's duty to arbitrate at all.

Rather, the question here is whether third-party beneficiaries who are not statutory employees, are bound to accept exclusive representation by a union which is not their collective bargaining representative and owes them no Section 9 duties of fair representation, and proceed under a grievance procedure limited to statutory employees. The latter was certainly not the question in *Steelworkers v. Canron, Inc.,* 580 F.2d 77 (3rd Cir. 1978), a decision petitioners urge on this Court.

Petitioners in seeking review do not propose that the Court consider its prior decisions nor do petitioners suggest any reason now for this Court to change or reverse the rationale for the above cited long-standing decisions. Similarly, petitioners for review do not suggest that this Court even consider in its review the demands in ERISA Section 503, 29 U.S.C. §1133, requiring a full and fair review by a fiduciary. That is one of the respondents' questions presented, should this Court decide this is an appropriate case to grant review.

III. The Eighth Circuit Correctly Applied This Court's Decision In *Schneider,* Supra, To The Facts Of This Case

This Court held in *Schneider,* supra, that the presumption favoring arbitrability is not the proper rule in determining whether provisions for arbitration between the employer and the union be applied to disputes between the trustees and the employer, even if the dispute raises questions calling for interpretation of the union agreement. This Court treated actions under a plan as "trust" actions. In this case the plan obligation is separate and calls for *no interpretation* of the collective bargaining agreement, making respondents' case far stronger against arbitration than the trustees had in *Schneider.* Moreover, this Court in *Schneider* held that because of the principles previously adopted in *Lewis v. Benedict Coal Corp.,* supra, a beneficiaries' protection case, "We adopt the same approach here and decline to adopt a mechanical application" of the arbitration trilogy. Petitioners in seeking certiorari ask this Court to make the "mechanical application" for all but multi-employer plan trustees.

This Court in *Schneider* called for careful inquiry to see whether the plan or the union contract demonstrated the parties' specific intent that the union arbitrate questions of plan construction. This would call for an examination of the circumstances surrounding the execution of both the plan and

union agreement, an examination that the district court in the decision petitioners exclude from their appendix, had called respondents frivolous for suggesting be made. The plan was unilaterally created outside of collective bargaining. Many of the respondents had retired and "vested" their insurance benefits for life long before anything was said in the plan about resolution of disputes.

When the plan document was amended finally to refer to resolution of plan disputes, there was no showing that the referral was intended to apply to those who retired. In fact respondents' evidence proffered by affidavit since there was no hearing, was that Alpha historically rejected union attempts to represent retirees. Petitioners offered no evidence to show that the rewording of the plan was intended to change the union's non-role as to retirees or to thereafter require the local union to represent the retirees under a duty of fair representation. The grievance/arbitration procedure in the Local Agreement restricted that procedure solely to employees. It's clear no party had retirees in mind under that grievance procedure or plan resolution referral. Thus in the summary plan description petitioners noted an alternative review procedure was available to respondents; they were told they did not have to use the contract grievance procedure.

Considering that the arbitration trilogy presumption is lost in ERISA suits, the plan's dispute referral provision is entitled to even less meaning, for the "Basic Agreement" to which it refers for resolution contains no dispute resolution procedures. The plan referral clause is thus totally meaningless. The district court avoided this dead-end by using the trilogy presumption to reform the plan's referral language to change "Basic" to "Local," even though the grievance procedure in the "Local Agreement" was limited solely to grievances of statutory employees and designed to accomplish that purpose only. Petitioners even conceded on page 26 of their appeal brief to the Eighth Circuit that the grievance arbitration clause is "no model

of draftsmanship." With the trilogy presumptions lost, petitioners can find no clear mandatory arbitration clause for retirees in either the plan, the Basic Agreement or the Local Agreement.

Because the grievance procedures in the Local Agreement are limited solely to grievances brought by statutory employees, this Court's statement in *Schneider* that "no suggestion that either the [employer] or the Union intended to require the arbitration of disputes between the trustees and the employer," 80 L.Ed.2d at 375, would apply equally well here to disputes raised by beneficiaries who are not statutory employees. This Court's conclusion in *Schneider* that it was "unreasonable to infer that the union agreement or the plan intended the trustees to rely on the union to arbitrate their disputes with the employer," *ibid,* is as equally applicable here. Petitioners' own summary plan description providing an alternative procedure,[8] further supports the lack of reason for petitioners to infer that either the Local Agreement or the plan intended the beneficiaries to rely upon the union to arbitrate retiree disputes with the employer.

Since *Schneider* was not a benefit denial case, this Court had no reason to cite ERISA §503, 29 U.S.C. §1133, as additional support. While petitioners complain the Eighth Circuit rejected arbitration in favor of the alternative use of ERISA Section 503 procedures, 29 U.S.C. §1133, creating what petitioners call a "loophole," it was Congress who rejected arbitration in favor of Section 503 procedures. H.R. Rep. No. 93-1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5108. And petitioners created their own "loophole" by providing an alternative procedure in the summary plan description.

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[8] The summary plan description's allowance of review by ERISA Section 503 procedures, 29 U.S.C. §1133, without resort to the contractual grievance procedure, is akin to the express allowance in the separate trust agreement in *Schneider* allowing the fiduciary to proceed other than through the collective bargaining representative.

One circumstance this Court mentioned in *Schneider* as relevant in determining what the parties meant, is whether a showing can be made that the local union intended to incur arbitration expenses at the request of those the plan protected, there the trustees, here the retirees. 80 L.Ed.2d at 375. Petitioners offered no evidence on this point beyond petitioners' admission that the arbitration language is "no model" of clarity. Respondents offered evidence by affidavit that when they pleaded with the national union for help and guidance, respondents were told that the union had no intention of taking any action to incur expense, that the retirees were "on their own." This showing was further bolstered by respondents' offer of evidence by affidavits in the district court, showing that historically petitioners had never allowed the union to negotiate for retirees and that the union never viewed itself as incurring any obligation or expense to take up grievances on the behalf of retirees.

From this evidence we submit this Court's statement in *Schneider* that

> "We find particularly implausible petitioner's further argument that a duty of fair representation may be implied, and that this should compel the Union to pursue the trustees' uncompromised claims through arbitration. There is simply **no evidence that the Union owes any statutory or contractual duty of fair representation to the trustees.**" 80 L.Ed.2d at 375 (emphasis supplied)

applies with full force here.

This Court's statement is particularly compelling in light of the fact that in note 22, 80 L.Ed.2d at 376, this Court advised that the duty of fair representation runs only to members of the collective bargaining unit and is only "**coextensive with its statutory authority** to act as the exclusive representative for all employees within the unit." Petitioners simply seek to avoid this Court's recognition of the limits of exclusive representa-

tion, much as we noted petitioners seek to avoid the meaning of Section 9 representation and all that entails as envisioned by this Court in *Humphrey v. Moore,* supra, and *Allied Chemical Workers,* supra.

This Court in *Schneider* went on to say in the text of its opinion

> "In the absence of evidence we will not engage the **unlikly inference** that the parties to these agreements intended to require the trustees to rely on the union to arbitrate their disputes with the employer." 80 L.Ed.2d at 376 (emphasis supplied)

At that point this Court again dropped another footnote indicating that the duty of fair representation is not easily applicable to nonbargaining unit persons. 80 L.Ed.2d at 376 n.23. This Court said it was wary of imposing such a duty on the union. Hence respondents really cannot complain about the treatment they received from the national union—they were "on their own." Petitioners totally ignore this Court's reasoning, still hoping this Court will engage in the "unlikely inference" the union intended to arbitrate retiree disputes and thus petitioners seek a "mechanical application" of the arbitration trilogy for all but multi-employer plan trustees.

IV. Petitioners Failed To Include In Their Appendix All Decisions Below

This Court requires petitioners to include all relevant decisions below. Petitioners failed in include one of the district court decisions from which respondents took an appeal to the Eighth Circuit. See note 1 supra. The petition should therefore be dismissed.

CONCLUSION

As long as *Allied Chemical Workers,* supra, is the law, that retirees are not statutory employees, no reason appears to review rights and obligations of unions to retirees in the context of an ERISA action brought by the retirees against those responsible for denying benefits and repudiating plan obligations, as Congress expressly authorized. 29 U.S.C. §§1001(b), 1132. This Court has already made it quite plain in *Schneider* where it stands. Petitioners avoid this Court's reasons for its decision in *Schneider.*

Both panel and en banc decisions of the court of appeals are correct and fully comport with the decisions of this Court, and are not in conflict with the decisions of any other circuit court of appeals. The petition for a writ of certiorari presents no issue worthy of this Court's consideration, and it should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 82-1413-C(4)

Robert Anderson, Jr., et al
Plaintiffs,

v.

Alpha Portland Industries, Inc., etc., et al
Defendants.

NOTICE OF APPEAL

(Filed March 15, 1983)

Notice is hereby given that plaintiffs hereby appeal to the United States Court of Appeals for the Eighth Circuit from the orders issued by this Court on November 12, 1982 granting summary judgment and on March 4, 1983 denying new trial and reconsideration, which orders are now final judgments of the Court.

March 15, 1983

/s/ Sheldon Weinhaus MBE #16699

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APPENDIX B

Statutes Cited

29 U.S.C. §157

Employees shall have the right to self-organization, to form, join, or assista labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. §159(a)

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. §185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the

United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §1001(b)

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §1022

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. . . .

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the

provisions providing for nonforfeitable pension benefits; circumstrances which may result in disqualification, ineligiblity, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 U.S.C. §1104(a)(1)(A)(i)

Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; . . .

29 U.S.C. §1132(a)(1) and (3)

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. §1133

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.